(4)

No. 09-104

Supreme Court, U.S.
FILED
OCT 19 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

AD HOC COMMITTEE OF KENTON COUNTY BONDHOLDERS,
Petitioners,

v.

DELTA AIR LINES, INC.,
KENTON COUNTY AIRPORT BOARD, UMB
BANK, N.A., AS TRUSTEE, POST EFFECTIVE DATE COMMITTEE
AS SUCCESSOR TO THE OFFICIAL COMMITTEE OF UNSECURED
CREDITORS OF DELTA AIR LINES, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF IN FURTHER SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

J. CHRISTOPHER SHORE
WHITE & CASE LLP
1155 AVENUE OF THE AMERICAS
NEW YORK, NY 10036-2787
TELEPHONE: (212) 819-8200
FACSIMILE: (212) 354-8113
COUNSEL FOR THE PETITIONERS

RAOUL G. CANTERO
COUNSEL OF RECORD
THOMAS E LAURIA
JOHN K. CUNNINGHAM
DAVID P. DRAIGH
RICHARD S. KEBRDLE
WHITE & CASE LLP
WACHOVIA FINANCIAL CENTER
200 SOUTH BISCAYNE BLVD.,
SUITE 4900
MIAMI, FLORIDA 33131-2352
TELEPHONE: (305) 371-2700
FACSIMILE: (305) 358-5744
COUNSEL FOR THE PETITIONERS

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

IN THE

Supreme Court of the United States

No. 09-104

AD HOC COMMITTEE OF KENTON COUNTY BONDHOLDERS,
Petitioners,

v.

DELTA AIR LINES, INC.,
KENTON COUNTY AIRPORT BOARD, UMB
BANK, N.A., AS TRUSTEE, POST EFFECTIVE DATE COMMITTEE
AS SUCCESSOR TO THE OFFICIAL COMMITTEE OF UNSECURED
CREDITORS OF DELTA AIR LINES, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF IN FURTHER SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The Petitioners, members of the Kenton County Bondholders Committee, respectfully submit this supplemental brief in further support of their petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

ARGUMENT

As shown in the Petition, the circuit courts, construing the same provisions of the Bankruptcy Code—specifically sections 524(e) and 105(a)—are divided over whether those sections authorize a bankruptcy court to release non-debtors.

Two circuits—the Ninth and Tenth—have held that bankruptcy courts lack jurisdiction to release non-debtors from liability. The Second, Fourth, Sixth, Seventh and Eleventh Circuits, however, have held that such releases are permitted, and the Third Circuit has indicated in *dicta* that such releases may be permissible under certain circumstances.

Although the Fifth Circuit had also suggested, in *dicta*, that such releases might be permissible, the split among the circuits on this issue has become even more defined with the Fifth Circuit's recent decision in *Bank of N.Y. Trust Co., NA v. Official Unsecured Creditors' Committee (In re The Pacific Lumber Co.)*, --- F.3d ---, No. 08-40746, 2009 WL 3082066 (5th Cir. Sept. 29, 2009). In that case, the bankruptcy court confirmed a reorganization plan that released several non-debtors "from liability—other than for willfulness and gross negligence—related to proposing, implementing, and administering the plan." *Id.* at *15.[1] The Fifth Circuit held, "however, that 'discharge of a debt of the debtor does not affect the liability of any other entity on ... such a debt.'" *Id.* (citing 11 U.S.C. § 524(e)).

Indeed, the court noted that, "[i]n a variety of contexts, this court has held that Section 524(e) only releases the

---

[1] As an initial matter, the court found that "this claim is not equitably moot. '[E]quity strongly supports appellate review of issues consequential to the integrity and transparency of the Chapter 11 process.'" *Id.* (quoting *In re Hilal*, 534 F.3d 498, 500 (5th Cir. 2008)).

debtor, not co-liable third parties." *Id.* (citing *In re Coho Res., Inc.*, 345 F.3d 338, 342 (5th Cir. 2003); *Hall v. Nat'l Gypsum Co.*, 105 F.3d 225, 229 (5th Cir. 1997); *Matter of Edgeworth*, 993 F.2d 51, 53-54 (5th Cir. 1993); *Feld v. Zale Corp.*, 62 F.3d 746 (5th Cir. 1995)). The court described those cases as establishing a "categorical prohibition against non-debtor releases." *Id.* at *15 & n.27. Accordingly, finding "little equitable about protecting the released non-debtors from negligence suits arising out of the reorganization," the court struck the non-debtor releases. *Id.* at *15-16.[2]

Thus, the Fifth Circuit joins the Ninth and Tenth Circuits in holding that bankruptcy courts are without jurisdiction to release non-debtors from liability, further demonstrating the division among the circuits on this important issue which, as shown in the Petition, is crucial to the reorganization of businesses under the Bankruptcy Code.

---

[2] The court did not strike releases "with respect to the Creditors Committee and its members," finding that such releases, although not permissible under section 524(e), comported with the qualified immunity enjoyed by creditors committees under section 1103(c) of the Bankruptcy Code. *Id.* at *15-16.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

J. CHRISTOPHER SHORE
WHITE & CASE LLP
1155 AVENUE OF THE AMERICAS
NEW YORK, NY 10036-2787
TELEPHONE: (212) 819-8200
FACSIMILE: (212) 354-8113
COUNSEL FOR THE PETITIONERS

RAOUL G. CANTERO
COUNSEL OF RECORD
THOMAS E LAURIA
JOHN K. CUNNINGHAM
DAVID P. DRAIGH
RICHARD S. KEBRDLE
WHITE & CASE LLP
WACHOVIA FINANCIAL CENTER
200 SOUTH BISCAYNE BLVD.,
SUITE 4900
MIAMI, FLORIDA 33131-2352
TELEPHONE: (305) 371-2700
FACSIMILE: (305) 358-5744
COUNSEL FOR THE PETITIONERS

OCTOBER 2009